

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION**

Milwaukee, Wisconsin

**TEWS COMPANY, DBA WISCONSIN
DIVISION OF LAFARGE CONSTRUCTION
MATERIALS¹**

Employer

and

Case 30-RC-6097

**DRIVERS, SALESMEN, WAREHOUSEMEN,
MILK PROCESSORS, CANNERY, DAIRY
EMPLOYEES AND HELPERS UNION
LOCAL 695, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The names of the Employer and the Petitioner appear as amended at the hearing.

² Timely briefs from the Employer and the Petitioner have been received and duly considered.

3. The Labor Organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9 (b) of the Act:

All full-time and regular part-time batch employees employed by the Employer at its western division plants; excluding truck drivers, mechanics, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.³

ISSUES AND POSITIONS:

The Petitioner seeks an election among the Employer's western division full-time and regular part-time batch employees, giving those employees the opportunity to vote to be included for collective bargaining with Petitioner's existing western division truck driver/mechanic bargaining unit. However, Petitioner also is not opposed to a separate bargaining unit of these batch employees. Additionally, Petitioner asserts that batch employees Brad Anderson, Stephanie Hachhuber, and Robert Otto are not supervisors as defined in Section 2(11) of the Act, and that Otto is an eligible voter with a reasonable expectancy of recall.

Conversely, the Employer contends that Anderson, Hachhuber, and Otto are statutory supervisors inasmuch as, among other considerations, they independently direct and supervise the work of the truck drivers working out of their batch facilities. Additionally, the Employer asserts Robert Otto does not have a reasonable expectancy of recall. It also is the Employer's position that if the here-involved batch employees are not found to be statutory supervisors, they should be in a separate bargaining unit, noting that they report truck driver rule infractions and related matters to the Employer.

BUSINESS OPERATIONS BACKGROUND

The Employer is a Milwaukee, Wisconsin based ready-mix concrete company. Its western or rural division is its only operation involved in this proceeding. That division presently has ready-mix batch plants located in Columbus, Juneau, Mayville, Neosho, and Watertown, Wisconsin. Pursuant to proceedings in Case 30-RC-5359, since June 5, 1992 the Employer's western division full-time and regular part-time truck drivers and mechanics have been represented by Petitioner. Western division batch employees, for whom Petitioner seeks representation in this proceeding, are, as "batchmen", specifically excluded from its noted truck driver/mechanic unit. Those batch employees have not been represented by any labor organization.

According to Employer witness Bingen, the line of authority within the western division includes his superior David Ferron, himself as the area manager, supervisor Dennis Persha, and batchpersons Brad Anderson at Watertown, Stephanie Bachhuber at Mayville, and Robert Otto at Columbus.

The primary ready-mix season is from April or May until about the end of November. While waiting for loads, on an as needed basis during the primary season, and particularly during the winter off season the working batch employees and drivers also do yard work, general plant maintenance and remodeling. That work constitutes as much as 50% of their work during the winter off season. To some extent the drivers are also involved in the maintenance and safety of their vehicles.

The Juneau and Watertown facilities are operated year around. Mayville has operated every year, as the weather permitted. In recent years, the Neosho facility has, on a need basis,

³ The parties stipulated to the appropriateness of this unit.

been operated very sporadically. It has not been budgeted for 1999 operations. Apparently, it is a facility in need of repairs. The Employer contends Neosho will, again, not be reopened this year.

According to Employer witness Bingen and supporting documentation, the Columbus facility closed in November 1998 and has not been budgeted for 1999 operations. Not scheduled for operations this year, it is unclear from the record whether there has been any plant maintenance at the Columbus facility since its closing. Bingen testified that with repairs the Columbus facility could be reopened. Bingen further testified that the Fall 1998 decision not to operate the Columbus facility during 1999 was recently reaffirmed. Accordingly, the one Columbus based driver was reassigned to the Juneau facility.

Additionally, western division area manager Bingen testified that based on the Employer's decision not to reopen its Columbus facility, Robert Otto, the Columbus batchperson, was permanently laid off. The record is silent as to what the Employer told Otto when he was laid off and/or since then regarding his continued employment. However, the Employer contends through Bingen, without contradiction, that it does not have another position for Otto. Mr. Otto did not testify. The Employer also asserts that Otto has a number of very serious health problems. In that regard, Employer witness Bingen testified that during his recent performance review meeting with Otto, Otto additionally informed him that he (Otto) did not feel that he could physically perform his batching job duties.

Clearly, the Juneau facility, a computerized batch plant, also is the hub of the western divisions' operations. Bingen, the division's area manager, the division's single clerk, and the division's mechanic operations as well as most of the drivers are based there. Bingen visits the Mayville and Watertown facilities once or twice a week during the primary season.

The Juneau facility does about 40% of the division's total production. Additionally, about 95% of western division orders, including all telephone orders, come directly into the Juneau facility. From Juneau they are disbursed/dispatched to the other western division facilities for delivery. Likewise, orders placed directly at the other western division facilities are cleared through the Juneau facility and its supervisor-dispatcher/batchperson Dennis Persha⁴ before they become confirmed orders. Batchers Anderson and Bachhuber testified that near the end of each work day Persha contacts them and gives them the current orders for the next work day for their respective facilities. Additionally, Anderson and Hachhuber testified, without contradiction, that Persha then suggests next day starting times for drivers at their facilities. Anderson testified that Persha usually made each day's first run driver assignments, which information the batchers relay to the drivers.

SUPERVISORY FACTS

The record in this matter consists primarily of the testimony by western division area manager Bingen asserting that batchpersons Anderson, Bachhuber, and Otto are vested with and have exercised certain supervisory authority, and Anderson and Bachhuber basically denying those assertions.

The documentary evidence is not particularly probative as to the supervisory issue. One exhibit, an organizational chart, submitted by the Employer (E-4) was prepared for the hearing. Bingen acknowledged that it shows who answers to him but that it is not accurate in that those listed at the level below him are not necessarily all at the same level. Additionally, although no formal job description for the here-involved batch employees was made a part of the record, a

⁴ The record supports the parties' stipulation, and I find, that Dennis Persha is a supervisor within the meaning of Section 2(11) of the Act, particularly based on his authority to assign work and his use of independent judgment in the performance of those duties.

job posting, setting forth duties and responsibilities, was also submitted by the Employer (E-5) for a supervisor/batchperson position at a facility in the Employer's urban division. There is insufficient record evidence to compare that urban division batching position with the batch position in this proceeding. Accordingly, that document has not been given any weight.

The batching function involves the placement into a ready-mix delivery truck of the right materials with the right consistency to make the ordered concrete. Without contradiction Anderson testified there were four drivers who also knew how to batch and that, normally when he was off during the season, a driver would fill-in for him. Additionally, Anderson testified that driver Ed Ferrel was the individual who showed him how to batch. Likewise, without contradiction, Bachhuber testified that two other drivers who worked at her Mayville yard also know how to batch. Bingen testified that drivers had batched at Neosho and that for a week at a time Petitioner bargaining unit employees have also replaced and batched for Persha. Bachhuber testified she is batching 80% of the time.

Bingen testified that the batchers are to monitor the drivers so that they punch out as close as possible to 8 hours each day. At times the batchers will tell drivers when to take their lunch break. The batchers provide the drivers with delivery tickets which they complete and return to the batchers. In that regard, according to Bingen it also is the batcher's responsibility to manage time and thereby get the loads to the jobs on time.

Bingen further testified that the batchpersons are responsible for yard clean-up and safety, and to verify the driver's timeclock punched time cards before forwarding them to the Juneau facility. As to time card verification the batchers may review delivery tickets to determine if, or when, a lunch break was taken. According to Bingen the batchers also fill out accident reports that are relayed to the Juneau facility. The driver load assignments made by the

batchers are based on driver availability, ability to make the delivery, experience, seniority, employee preference, and customer request. The batchers make routine between load assignments of yard or batch equipment maintenance work.

According to Anderson and Bachhuber, both three year batchers, they punch the timeclock as non-exempt salaried employees and receive overtime pay. According to their uncontradicted testimony, they currently earn \$9.42 and \$10.13 per hour respectively. The record does not reflect Otto's non-exempt salary or hour wage rate. Bingen testified the \$19,000 to \$40,000 salary range for batchers is based on years of experience. Anderson and Bachhuber's wages are more than \$1.50 per hour below the minimum hourly wages for drivers and mechanics with like tenure. In that regard, Anderson started at \$7.50 per hour whereas three years ago the starting driver or mechanic wage rate was \$9 an hour. The record does not reflect the exempt salary of supervisor Persha, supervisor-dispatcher/batchperson at the Juneau facility. Based on Anderson's testimony it is unclear if the batchers receive paid sick days. The batch employees receive the management fringe benefit package which is somewhat more generous than the drivers' 401 (k) plan and paid holiday benefits.

Anderson and Bachhuber⁵ work hours similar to the scheduled hours of the several drivers based at their facilities. With the drivers, they show new employees what needs to be done. It appears that utilizing a team concept, with the batchperson as the team or crew leader, the employees at each facility take care of required yard and general/preventive maintenance work. In this regard Bachhuber testified that the drivers work together with her in taking care of customers and loading the batching bins. General knowledge of drivers' skills and abilities for needed maintenance work is a factor as to which employee does such work. However, according

⁵ Bachhuber is a backup to Persha at Juneau.

to Anderson and Bachhuber seniority is the controlling factor in work assignments where more than one employee is available for driving and/or maintenance work.

The batchpersons do not lay off, recall, hire, fire or formally discipline the drivers. Bingen testified that they can give oral warnings. In this regard, Bingen testified that the batchers are his “eyes and ears” at their respective plants. Anderson and Bachhuber testified that they report employee problems to Bingen. Two incidents were testified to regarding specific problems Bachhuber had with drivers. At issue is whether Bachhuber made effective recommendations as to those situations. At best, the conflicting testimony is inconclusive. Bachhuber testified that as to one driver she told Bingen that something had to be done, but she did not recommend what that something should be. That driver quit before Bingen took any action.

As to the batchpersons’ oral warning authority Bingen testified to, according to Anderson and Bachhuber, it seem to essentially be reminders of what the drivers are to do, such as leave the yard upon being loaded. The record is silent as to whether such oral reminders/warnings are regularly reported to Juneau facility management, recorded anywhere as constituting discipline, or the basis for progressive discipline.

Bingen further testified that in consideration of Otto’s health problems and after discussions with him and at his suggestion a particular driver was assigned to the Columbus facility to work with Otto.

The batchers are not involved in the granting of vacation time. They refer vacation requesting drivers to the Juneau facility and its management to determine if another driver is on vacation on the desired days, or they relay those drivers’ vacation requests to Juneau facility management, just as they relay employee grievances and customer complaints. Likewise, they

inform Juneau facility management of driver requests to leave work early, including because of illness. Similarly, notwithstanding Bingen's contention to the contrary, it appears that batchpersons do not authorized overtime. Driver overtime is normally dictated by late deliveries authorized by supervisor-dispatcher/batchperson Dennis Persha. It appears that absent extraordinary circumstances overtime is not worked on maintenance projects.

The record is silent as to whether the batchers have had any supervisory training. However, the issue of batchers' supervisory skills is addressed in their evaluations. They do not attend supervisor meetings. They also are not involved in the formal evaluation of employee work performance or the granting of wage increases. When asked by area manager Bingen, the batchpersons have offered their views as to performance matters, particularly as to how probationary employees are catching on to their jobs, whether employees report to work on-time, and for winter maintenance and remodeling work assignments.

As noted above, the starting times for the initial driver deliveries are set the night before based upon when those initial loads are to be delivered according to supervisor Persha's directions. The batchpersons call in a sufficient number of drivers, including drivers suggested by Persha, to timely make known deliveries.

ANALYSIS AND CONCLUSIONS

Supervisory Issue:

Section 2(11) of the Act defines a "supervisor" as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The powers enumerated in Section 2(11) are read in the disjunctive, and if an employee possesses any one of them he or she will be a “supervisor” for purposes of the Act. *NLRB v. McEver Engineering*, 784 F.2d 634, 642 (5th Cir. 1986). The burden of proving supervisory status rest on the party claiming the existence of such status. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994).

The evidence in this record does not establish that the western division batch employees possess any indicia of a supervisor within the meaning of the Act. The testimony establishes that they have no authority to hire, discipline, or discharge any other employees, or to effectively recommend such actions. Similarly, there is no evidence that they are managers, who formulate and effectuate management policies by expressing and making operative the decisions of their employer. *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980). With reference to the Employer’s Exhibit E-5 “Supervisor/Batchperson” noted title, it is well established that an employee’s title is not dispositive of supervisory status. *Health Care Logistics*, 273 NLRB 822, 824 (1984).

These batchpersons simply are crew leaders in a team approach to getting done that which needs to be done. Clearly, the batchpersons are communication conduits who relay information to and from management regarding batch plant operations. This reporting function is not supervisory. A significant portion of the batchers’ time involves manual labor, working with or in conjunction with Petitioner represented drivers. The drivers help with batchers’ tasks and, occasionally, fill-in for them.

The batchers’ scheduling, assigning or distributing work to those drivers based on driver availability, seniority, skill and abilities, experience, employee preference and/or the suggestions of management also does not establish supervisory status. It appears that most of such

assignments are routine, not requiring independent judgment. In that regard, given the time requirements for load deliveries and that drivers are given delivery tickets, the assignment of lunch breaks involves routine judgment. Likewise, the batchers' review and forwarding of time cards is a routine action, ministerial in nature, which does not rise to the level of indicia of statutory supervisory status.

The assignment of overtime typically occurs only after consultation with admitted supervisors. Similarly, the batchers', when requested, input and views to management regarding employee abilities or performance is insufficient to establish supervisory authority. Likewise, the batchers' allowing employees, including sick employees, to leave work before the end of their shift also does not involved the exercise of independent judgment.

These batchpersons, as crew leaders, punch the timeclock, receive overtime and share similar work (batch, yard and maintenance) with the drivers. Their hourly rate equivalent is in the range of employees in Petitioner's existing bargaining unit and their fringe benefits are similar. Given the team approach at their batch plants, their terms and conditions of employment show an overall community of interest with the western division truck drivers and mechanics. *Alois Box Co., Inc.*, 326 NLRB No. 110 (1998); *Chrome Deposit Corporation*, 323 NLRB 961 (1997); *PECO Energy Company*, 322 NLRB 1074 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996); and *Blue Star Ready-Mix Concrete Corporation*, 305 NLRB 429 (1991). Accordingly, I conclude that Brad Anderson and Stephanie Bachhuber are eligible to vote in the election directed herein.

Robert Otto's Voter Eligibility:

The record establishes that Robert Otto has been on layoff since the November 1998 closing of his Columbus batch plant. Bingen's uncontradicted testimony was that Otto's layoff

is permanent at this point, noting the Employer's recently reaffirmed economic decision not to budget for 1999 Columbus operations and that the Employer does not have a position for him. Based on these considerations and the resulting reassignment of the Columbus based driver, there is not a reasonable expectancy that Otto's Columbus batch plant will operate this year.

Each batch plant has operated with only one batcher. There is no indication that any other western division batching positions will become available or that the Employer will have the need for another full-time or regular part-time batch employee. Additionally, there is a pool of drivers who can batch, and a practice of utilizing them as short term batchers.

Therefore, it is the totality of these objective considerations on which basis I conclude that Robert Otto does not have a reasonable expectancy of future employment in the western division, and thus is not an eligible voter. *S & G Concrete Co.*, 274 NLRB 895 (1985). I've reached this conclusion notwithstanding that Otto's most recent performance evaluation which the Employer completed about early February of 1999 indicates in the "Career Interest/Development Plans" section, without explanation in the record, that an update/original is due on 6-1-99. Accordingly, I find based on the record herein that Robert Otto is not eligible to vote in the directed election.

Self-Determination Election Issue:

By agreement of the parties in the underlying election agreement, the Board's 1992 Certification of Representative in Case 30-RC-5359 and the parties' recently expired contract covering Petitioner represented western division truck drivers and mechanics specifically exclude "batchmen". Notwithstanding that exclusion, that contract does not include an explicit waiver of Petitioner's representation rights as to the batchpersons.

No other union seeks in this proceeding to represent the Employer's western division batch employees. Based upon well established precedent, given that the batching classification (formerly referred to as "batchmen") was in existence prior to the certification of Petitioner's existing western division truck drivers and mechanics unit from which the batch employees were excluded, and inasmuch as they share common interests with the employees in Petitioner's existing unit, they may appropriately be included in such unit if a majority of the western division batch employees so desire. *The Budd Company Automotive Division*, 154 NLRB 421, 428 (1965).

DIRECTION OF ELECTION

In view of the foregoing decisions, I shall direct an election in the unit of the Employer's western division batch employees as more fully set forth in the above-described bargaining unit. If a majority of the voting employees in that unit cast their ballots for the Petitioner, they will be taken to have indicated their desire to constitute a part of the existing unit of "all full-time and regular part-time truck drivers and mechanics employed by the Employer at its Western Division facilities," currently represented by the Petitioner, and the Petitioner may bargain for such employees as part of that unit. If a majority of them vote against the Petitioner, they will be taken to have indicated their desire to remain unrepresented, and a Certification of Results will issue to that effect.

According, an election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill,

on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL 695, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including the first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make this list available to all parties to the election. To speed preliminary checking and the voting process

itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office at Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, on or before April 9, 1999.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington, DC by April 16, 1999.**

Signed at Milwaukee, Wisconsin this 2nd day of April 1999.

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